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The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions

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I. INTRODUCTION

"[T]he law does, in general, determine liability by blameworthiness . . . ."[1] When Oliver Wendell Holmes wrote these words in *The Common Law* in 1881, the fault basis of accident law was at its height. Yet the rules of accident law in the late nineteenth century had only recently emerged from a tradition that was centuries old and fundamentally strict. Nor would many years pass before the foundations of accident law would begin to shift away from fault back in the direction of strict liability.[2] Playing a major role in this latter development was the law of products liability.[3] Today, products liability law is principally based on strict liability.[4]

In viewing this development one might well be tempted to conclude that accident law should no longer concern itself with "fault" or "blame"—that its experiment with such concepts should be viewed only as a digressive flirtation with Victorian moralistic notions that have no place in an enlightened system of law. But there is a different view of the evolution of the law of torts: that, even prior to the development of the negligence action, liability had important roots in the concept of fault.[5] Holmes himself subscribed to this in-

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[1]O. HOLMES, THE COMMON LAW 108 (1881) [hereinafter cited as O. HOLMES].

[2]These developments have been traced elsewhere. *See, e.g.*, Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); James, *Analysis of the Origin and Development of the Negligence Actions*, in U.S. DEP'T OF TRANSPORTATION, THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION (1970); Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970).

[3]The first such cases were brought in warranty and involved the sale of defective food. *See, e.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

[4]Liability for selling defective products is "strict" under U.C.C. §§ 2-313, 2-314, 2-315 (1972 version), and RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965).

[5]"[D]espite the initial dominance of the idea of strict liability, there was evident almost from the beginning an intuitive concern by courts for the defendant's blameworthiness or lack of it." Malone, *supra* note 2, at 44.

terpretation of tort law history.[6] And while fault has indeed experienced a rather spectacular eclipse in accident law in recent years, especially in the products liability area, there is no reason to conclude that blameworthiness has become irrelevant to the resolution of tort cases generally,[7] or products liability cases in particular.[8]

Elsewhere I have examined the role of fault in determining damages for aggravated misconduct, particularly in the products liability context.[9] The purpose of the present article is to explore the effect of aggravated fault on the central rules of liability[10] and defense[11] in products liability litigation.

It is axiomatic in tort law that a person will not be held responsible for all harm attributable to his actions. Rules of duty, causation, defense, and damages all operate in balance to restrict the scope of a defendant's legal responsibility for his damaging conduct. The total structure of such rules operates to accommodate various interests of the injurer, the injured, and society at large.[12] But lending support to this balanced structure of rules is the premise, true in perhaps most accident cases, that the defendant's damaging conduct was only inadvertent. As strict liability for product and other accidents has developed in recent years, imbalances in the classic negligence structure of the rules have been perceived, and adjustments have been made.[13] An imbalance in the structure of liability rules and defenses is also created when the defendant's actions,

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[6]*See* O. HOLMES, *supra* note 1, at 88-107.

[7]*See* Kelly, *The Inner Nature of the Tort Action*, 2 IR. JUR. 279 (N.S. 1967); Veitch & Miers, *Assault on the Law of Tort*, 38 MOD. L. REV. 139 (1975).

[8]While the negligence theory of liability is of course predicated on a form of blameworthiness, this article will discuss the effects of aggravated fault on other rules of liability and defense in products liability cases.

[9]Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976) [hereinafter cited as Owen, *Punitive Damages*].

[10]The central issues of liability that will be discussed are defectiveness, cause in fact, and proximate causation.

[11]The defenses to be discussed are contributory negligence, comparative negligence, assumption of risk, and product misuse.

[12]*See* O. HOLMES, *supra* note 1, at 144.

[13]Thus, for actions brought in strict tort, most states have eliminated the contributory negligence defense and have narrowed the defense of assumption of risk. *See* text accompanying notes 90-96 and 104-16 *infra*. In many states the defense of contributory negligence has been abolished and proximate cause limitations liberalized in the plaintiff's favor in actions against possessors of animals, RESTATEMENT (SECOND) OF TORTS §§ 515(1), 510 (Tent. Draft No. 10, 1964), and for abnormally dangerous activities, *id.* at §§ 524(1), 522. And of course major changes have been wrought by the workmen's compensation laws in the nature of the employee's rights concerning job-related accidents. *See, e.g.*, Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349 (1976).

lying at the other end of the culpability scale, fairly can be characterized as "flagrant," "willful and wanton," or "reckless." Here too certain limited reaccommodations have been made in the general tort law rules outside the products liability area to correct the resulting imbalances in the classic structure.[14]

The thesis of this article is that the imbalance in the rules created when a manufacturer acts recklessly, in flagrant disregard of consumer safety, should be rectified in order to maintain a fair accommodation of interests between the manufacturer and consumers. It is proposed that the scope of a manufacturer's legal responsibility for injuries from its defective products should reflect the measure of its culpability for marketing such products; that is, as blameworthiness increases, so should liability. This can be accomplished by broadening certain rules of liability and by narrowing certain rules of defense. It will be seen that the two general tort law rules to such effect—one pertaining to proximate cause[15] and the other pertaining to contributory negligence[16]—are logically applicable to the products liability context. Possible changes in certain other products liability rules will also be considered for use in the context of highly blameworthy marketing misconduct.

There is apparently no case law examining what effect a manufacturer's aggravated misconduct should have on the normal rules of liability and defense.[17] This is probably attributable to at least two factors. First, manufacturers generally do act responsibly in manufacturing and marketing their products and only infrequently act in a manner that is highly blameworthy or "reckless." Second, a body of products liability principles has begun to mature only in the past ten or fifteen years.[18] Over this time, most of the attention

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[14]*See* notes 15 and 16 *infra* and accompanying text.

[15]*See* notes 76-89 *infra* and accompanying text.

[16]*See* notes 90-96 *infra* and accompanying text.

[17]Research has uncovered only one reported products liability decision which even raises the issue, and the reference is in a footnote to the dissenting opinion. *See* Ussery v. Federal Laboratories, Inc., [1973-1975 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 7084, at 12,479 n.4 (4th Cir. 1973) (Winter, C.J., dissenting) (opinion withdrawn by order filed March 31, 1975).

[18]The seminal cases that spearheaded the modern development of products liability law were decided in 1960 and 1963. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The predominant treatise on products liability, L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (1976), was first published in 1960, and the first edition of the other treatise in the field, R. HURSH (now with H. BAILEY), AMERICAN LAW OF PRODUCTS LIABILITY (2d ed. 1974), was published one year later. The first Canadian text, S. WADDAMS, PRODUCTS LIABILITY, was published in 1974, and the first English text has just been published. C.J. MILLER & P. LOVELL, PRODUCT LIABILITY (Butterworths 1977).

of the courts and commentators has been focused in the other direction—on the central issues of the nature and reach of strict liability in tort and its defenses. Little thought has been devoted to the more peripheral and infrequent problems such as the one under discussion. Yet such problems must be addressed as the discipline develops, and hypotheticals can be used in lieu of decided cases as the basis for discussion.

II. "HIGHLY BLAMEWORTHY" CONDUCT IN THE PRODUCTS LIABILITY CONTEXT

The thought of a manufacturer's acting in a manner that is "blameworthy" or, especially, "highly blameworthy" is foreign to the traditional thinking of many persons in a free enterprise system such as ours. Certainly the affairs of manufacturing enterprises rarely, if ever, are conducted with the type of ill will or malice that characterizes the most culpable forms of human misbehavior. Indeed, manufacturing enterprises usually exist to generate a profit by making and selling goods—a singularly neutral, indeed beneficial, purpose and form of activity. Why and how, one may ask, would such enterprises ever act in a manner properly classifiable as "willful and wanton"?

The "why" part of the question in many cases is answered easily: to increase profits. In most other cases the explanation probably lies in the manufacturer's simple indifference to the safety attributes of its products.[19] The "how" part may be demonstrated by examining some cases.

Perhaps the classic case of manufacturer misbehavior was Richardson-Merrell's marketing in the early 1960's of MER/29, a drug supposed to reduce the level of blood cholesterol[20] and hence to reduce the incidence of heart attacks and strokes. From the start, the company's animal tests of the drug clearly indicated its potential danger, particularly to the subject's eyes. Yet in order to expedite the marketing of a drug that promised to be especially profitable, the company perpetrated a major fraud on the public. First, it submitted false test data to the Food and Drug Administration to obtain approval to sell the drug; then, to improve the drug's marketability, it lied about the drug's contraindications to its salesmen and the medical community.[21]

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[19]For an explanation of how the sale of defective products can be profitable, see Owen, *Punitive Damages*, *supra* note 9, at 1292-95. See *id.* at 1361-71 for an examination of the notion of flagrant indifference to consumer safety.

[20]There was some doubt that it did. *See* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 694, 60 Cal. Rptr. 398, 403 (1967).

[21]For a full description of Richardson-Merrell's conduct in the development and marketing of MER/29, see Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir.

A more recent example involves the marketing by the A.H. Robins Company of the Dalkon Shield, an intrauterine contraceptive device. Similar to the MER/29 situation, this manufacturer also hurried its product to the market in an attempt to reap substantial profits.[22] Misleading advertising[23] helped to stimulate a successful sales campaign.[24] But before long, the company found itself faced with a congressional investigation[25] and hundreds of lawsuits.[26] The reason for both was that users of the IUD incurred substantial risks of injury, sometimes fatal, which the manufacturer had failed to discover because its patently inadequate testing generated favorable but very inaccurate results.[27]

A final example of a manufacturer's acting in reckless disregard of consumer safety involves the design and marketing of an "uncrashworthy" automobile by General Motors. The plaintiff's decedent was killed when struck in the neck by the hood of his car which penetrated the windshield following a head-on collision. Despite its knowledge of over a hundred instances of windshield hood penetration from the same design that had resulted in disfigurement,

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1967); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968). The juries in both *Roginsky* and *Toole* rendered compensatory and punitive damages verdicts against the defendant, although the punitive damages verdict in the former case was reversed on appeal in a split opinion.

[22]The mark-up by manufacturers generally in the sale of IUDs to physicians is reported to have averaged nearly 1000 percent. *See Regulation of Medical Devices (Intrauterine Contraceptive Devices): Hearings Before the Subcomm. of the House Comm. on Government Operations*, 93d Cong., 1st Sess. 58 (1973) (testimony of Russell J. Thomsen, M.D.) [hereinafter cited as *Hearings*].

[23]The company is reported to have engaged in a deceptive promotional campaign based upon the results of patently deficient tests. "[T]he Dalkon Shield and its promotion provide the classic example of the misuse of statistics to market an item." *Id.* at 61. *See id.* at 61, 62, 74-76, 83-94. *See generally* M. DIXON, DRUG PRODUCT LIABILITY § 11.43 (1975); Note, *The Intrauterine Device: A Criticism of Governmental Complaisance and an Analysis of Manufacturer and Physician Liability*, 24 CLEV. ST. L. REV. 247 (1975); Comment, *Up Against the (Uterine) Wall: An Analysis of the Liability of Birth Control Products Manufacturers*, 2 S. ILL. U.L. REV. 498 (1976).

[24]By June 28, 1974, when A. H. Robins suspended distribution of the Dalkon Shield, the product had been inserted into approximately 2.2 million women in the United States. *In re* A. H. Robins Co., "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540 (J. P. M. D. L. 1975).

[25]*See Hearings*, *supra* note 22.

[26]It was reported over a year ago that more than five hundred actions had been filed against A. H. Robins Company for injuries caused by the Dalkon Shield. Wall St. J., Feb. 19, 1976, at 6, col. 2 (midwest ed.).

[27]*See Hearings*, *supra* note 22, at 61, 62, 74-76, 83-94. For a full account of the intrauterine contraceptive device problem in general and A. H. Robins' activities concerning the development and marketing of the Dalkon Shield in particular, see authorities cited in note 23 *supra*.

paralysis, and even decapitation, General Motors reportedly had not altered the design nor even warned of the danger.[28]

In each of these cases, the manufacturer's behavior was highly blameworthy.[29] Each of the three cases, however, represents a different form of misbehavior.[30] The MER/29 case exemplifies active deception of the public concerning a product's dangers. The Dalkon Shield case illustrates a reckless failure to discover a product's dangers. The uncrashworthy car case shows a reckless failure to remedy a dangerous condition known to be defective.

Yet despite the differences in these forms of misbehavior, each one deserves classification as "reckless," "oppressive," "willful and wanton," or "in conscious disregard of consumer safety." Probably the most descriptive phrase encompassing all three forms of marketing misconduct is "flagrant indifference to the public safety." This is the standard I have advanced for manufacturer punitive damages liability,[31] and it appears to be equally well suited to a reformulation of the rules of liability and defense in cases of flagrant marketing misbehavior. The principal characteristic of the conduct described in the standard is the manufacturer's gross abuse of its position of control over product danger information. It is behavior far more culpable than negligence,[32] reflecting a callous sacrifice of consumer interests for the benefit of the enterprise.[33] This is the nature of aggravated blameworthiness in the products liability context.

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[28]These facts laid the foundation for an unreported case against General Motors seeking compensatory and punitive damages that was settled before trial. Wallace v. General Motors Corp., No. WPB-75-65-Civ-CF (S.D. Fla. 1975). *See* Owen, *Punitive Damages*, *supra* note 9, at 1328 n.334.

[29]For other case examples of highly blameworthy manufacturer behavior, see Owen, *Punitive Damages*, *supra* note 9, at 1325-61.

[30]The following textual discussion of aggravated manufacturer misbehavior draws substantially upon Owen, *Punitive Damages*, *supra* note 9, at 1361-71.

[31]*Id.* at 1367.

[32]I am basically advocating a system in which the culpability of the defendant does not become relevant until it so substantially exceeds negligence as to reflect a different *kind* of misbehavior as well as degree—one that can fairly be called "flagrant," "oppressive," or "reckless." However, culpability in any degree should probably affect the apportionment of damages reduced on account of the misconduct of the plaintiff. *See* notes 97-103, 116, and 126 *infra* and accompanying text.

[33]The standard for determining reckless misconduct is often properly held to be objective. *See, e.g.*, Williamson v. McKenna, 223 Or. 366, 395-400, 354 P.2d 56, 69-71 (1960); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15, at 953-55 (1956). *See generally* Owen, *Punitive Damages*, *supra* note 9, at 1362-69. Not all courts agree. *See* 2 HARPER & JAMES, *supra*, § 16.15, at 49-51 (Supp. 1968). Although the standard of misconduct should probably be objective, evidence of the defendant's state of mind—consciousness of defectiveness in the products liability context—should nevertheless be admissible. *See* 2 HARPER & JAMES, *supra*, § 16.15 at 956-57; Owen, *Punitive Damages*, *supra* note 9, at 1369-70.

III. DEFECTIVENESS

The central issue of liability in many products liability cases is the defectiveness *vel non* of the product. For purposes of the present discussion the question is whether the aggravated blameworthiness of a manufacturer in marketing a product should affect the determination of whether it is deemed "defective." Because the conduct of the defendant as well as the defectiveness of the product is properly in issue in fraud and negligence cases, evidence of culpability is, of course, pertinent and goes to the essence of the cause of action. Yet the "strict" theories of products liability purport to direct attention away from the conduct of the manufacturer to the safety of the product within its environment of use.[34] Whether then a manufacturer's culpability may ever properly be considered on the liability issue in such cases will be examined in this section.

As a general principle, the manufacturer's blameworthiness in marketing a product in a particular condition probably should not be considered in determining the defectiveness of that condition.[35] The two concepts generally are unrelated. Either the product was manufactured according to specifications, or it was not; its design was adequately safe, or it was not; its warning adequately informed consumers of a hidden danger, or it did not. While these questions of defectiveness are often complex, involving the consideration of many factors,[36] the manufacturer's culpability in marketing the product in an injury-producing condition generally should not be one of them. Defectiveness is normally determined,[37] depending on the court, either on the basis of the consumer's reasonable expectations[38] or on

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[34]*See, e.g.*, Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 808-09 (1976); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 429 (1974) [hereinafter cited as Weinstein *et al.*]. The fact that the theory of recovery pleaded is "strict" should not impede consideration of the effect that a manufacturer's aggravated blameworthiness should have on the rules of liability and defense. *Cf.* Owen, *Punitive Damages*, *supra* note 9, at 1268-77.

[35]*But cf.* notes 40-42 *infra* and accompanying text.

[36]*See, e.g.*, Montgomery & Owen, *supra* note 34, at 814-19; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L. J. 825, 837-38.

[37]In manufacturing flaw cases, as a practical matter at least, defectiveness is usually determined on whether the product in fact contained a flaw. *Cf.* Montgomery & Owen, *supra* note 34, at 818-19 n.51. But even this determination can be difficult. *See* Weinstein *et al.*, *supra* note 34, at 430-33 n.11.

[38]*See, e.g.*, Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975). *See generally* RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, i (1965).

a risk-benefit or cost-benefit analysis.[39] Blame does not appear to be relevant to the issue.

The issue, however, is not always quite so clear. For one thing, those courts that use a *risk*-benefit method for determining defectiveness are relying at least in part upon the traditional negligence standard of liability which is rooted in the notion of blameworthiness.[40] If a court uses a *cost*-benefit approach, however, the manufacturer's actual blame in marketing the product in its offending condition will not be in issue at all since full knowledge of the harmful effects of the condition will be imputed to the manufacturer in any event under the theory of liability.[41] Nevertheless, some juries and perhaps even some courts will probably mistakenly consider blame to be relevant to the cost-benefit defectiveness determination. This is because the fact finder in some jurisdictions is asked to decide if the manufacturer would have been *negligent* in marketing the product in a particular condition if it had known of the injuries that would be caused as a result.[42]

Blame may creep into the defectiveness determination in another way. In difficult cases, defectiveness as a duty issue can become entangled in the other basic duty issue of proximate cause—both of which serve as vehicles for defining the scope of liability. As will be discussed below,[43] the normal rules of proximate cause may properly be stretched in cases of aggravated marketing misconduct. Thus, sometimes indirectly, blame may become relevant to the outcome of the duty issue whether it is framed in terms of defectiveness or of proximate cause. Moreover, as a practical matter in a case in which the adequacy of the design or warning is a close question, the jury will usually be tempted—and perhaps not inappropriately so—to tip the balance against a highly blameworthy manufacturer.

For example, suppose that as in *McCormack v. Hankscraft Co.*[44] a small child accidentally knocks over a vaporizer and is severely burned by the boiling water that gushes out. Even if it is shown

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[39]*See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Helicoid Gage Div. of Amer. Chain & Cable Co. v. Howell, 511 S.W.2d 573 (Tex. Civ. App. 1974).

[40]*See generally* Owen & Montgomery, *supra* note 34, at 824-29. Nor is this conclusion altered by the fact that the court may consider some additional factors, such as the manufacturer's ability to insure or spread the loss, not pertinent to a negligence determination. *Cf. id.* at 818; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

[41]*See* Montgomery & Owen, *supra* note 34, at 843-45.

[42]*Id.*; Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974).

[43]*See* text accompanying notes 76-89 *infra*.

[44]278 Minn. 322, 154 N.W.2d 488 (1967). In the Hankscraft vaporizer the water apparently looked still and did not appear to be boiling. *Id.* at 331, 154 N.W.2d at 496.

that the injury would have been prevented had the vaporizer top been threaded to screw onto the water container, or that it might have been averted if a warning had been given that the water was scalding hot, the defendant manufacturer might nevertheless interpose the defense that the danger was open and obvious.[45] Although this rule is breaking down,[46] some courts still hold as a matter of law that a product is not defective if the danger is obvious.[47] Assuming that the danger was obvious, *i.e.*, that boiling water was visible inside the glass container, a court following the obvious danger rule—or one applying a consumer expectations test of defectiveness—would be hard-pressed not to dismiss the case.[48] Suppose further, however, that while the manufacturer knew of a dozen other cases of severe burns caused by its vaporizers tipping over on small children in a similar manner,[49] it had nevertheless failed either to eliminate the hazard by threading the top or even to reduce it by giving a warning.

On such facts, the defectiveness determination by a court or jury might well be influenced by the blameworthiness of the manufacturer's inaction in the face of a known and serious danger.[50] Thus, despite the usual irrelevance of blameworthiness to the question of defectiveness, evidence of a manufacturer's gross irresponsibility may in some cases influence the determination of that issue.

IV. CAUSATION

In any discussion of the role of causation in tort law, it is helpful to isolate the issue of cause in fact from that of proximate causation.[51] While the two concepts frequently overlap and are often

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[45]*See id.* at 337, 154 N.W.2d at 496.

[46]*See, e.g.*, Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), abrogating the obvious danger-no duty rule of Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). *See generally* Marschall, *An Obvious Wrong Does Not Make a Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973).

[47]*E.g.*, Spangler v. Kranco, Inc., 481 F.2d 373 (4th Cir. 1973).

[48]In *McCormack*, the court held that the danger was not so obvious as to bar recovery. 278 Minn. at 333, 335, 154 N.W.2d at 496, 498. A court applying a consumer expectations test to determine the vaporizer's defectiveness would probably consider the expectations of the parents rather than of the child. *See* Bellotte v. Zayre Corp., 116 N.H. 52, 352 A.2d 723 (1976). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965).

[49]*See* 278 Minn. at 330, 154 N.W.2d at 495.

[50]The manufacturer's culpability will be even greater in such a case if, as in *Hankscraft*, it touts the safety of its product when it knows of a serious danger in the product. *See* 278 Minn. at 330, 154 N.W.2d at 495.

[51]*See generally* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

treated indiscriminately by the courts,[52] precise analysis requires that they be examined separately. This is particularly true where the context of their consideration is the blameworthiness of the defendant's behavior, since the law has treated them differently in this area.

A. Cause in Fact

Considered in the abstract, the determination of whether a plaintiff's injuries are in fact attributable to a product defect is logically unrelated to the manufacturer's blameworthiness in marketing the product in that condition. As one court said in a recent products liability case, "It is inconceivable that anyone should be held civilly liable for an injury which he did not cause, whether he be charged with negligence, intentional wrongdoing, or conduct giving rise to absolute liability."[53] The metaphysical notion of cause and effect thus appears to be a closed system concerning only the relationship of an action to events following thereafter, without regard to the culpability of the actor in producing the action.

This apparent irrelevance of blameworthiness to cause in fact is justified when the focus of analysis is on "but for" causation. That is, the manufacturer's blameworthiness will indeed be irrelevant to causation if it is shown that the plaintiff's injuries would have occurred in any event even if the product had not been defective. For example, suppose the driver of an automobile with defective brakes falls asleep at the wheel and is injured when his car hits a tree. Assuming the manufacturer's blameworthiness involved its failure to adequately test the car's brakes, there would be no "but for" causal relation between the defect, or the misconduct, and the injury. The injury would have occurred anyway, even if the brakes had been in perfect condition. In cases such as this, where the "but for" test of causation definitely exculpates the manufacturer, it should prevail regardless of the extent of its culpability in marketing the product in a defective condition.

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[52]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 41, 42, at 236, 244 (4th ed. 1971).

[53]Sabich v. Outboard Marine Corp., 60 Cal. App. 3d 591, 131 Cal. Rptr. 703, 706 (Cal. Ct. App. 1976). *See also* Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1975):

> With but a few recently developed and very limited exceptions, . . . the rule has been: no matter how tortious the defendant's conduct may have been and no matter how long or how strongly a given loss has been considered compensable, unless the plaintiff is able to persuade the fact finder by a preponderance of the evidence that the defendant's activity was at least *one* of the infinite 'but for' causes of his losses, the plaintiff cannot recover.

Id. at 163 (footnote omitted) (emphasis in original).

At least in products liability cases, however, cause in fact questions are usually of a different type. The more typical factual causation issue in this context is one of proof: is the circumstantial evidence of how the accident happened adequate to support the inferences that a defect existed in the product and that it was a substantial factor in producing the misadventure? This is a very different issue from "but for" causation; it is a question of *degree* of the certainty of proof, of the *likelihood* that a product defect was an appreciable factor in producing the accident. This is in fact the primary form of proof of causation available in a good number of products cases, particularly where the plaintiff is killed in the accident, and where the evidence on causation is circumstantial and admits of alternative explanations of how the accident occurred. A workable rule applied to this type of cause in fact problem in some torts cases outside of the products liability area is that to prevail, the plaintiff must only show that the defendant's conduct substantially increased the risk of the type of harm he suffered.[54] This concept of causation is sometimes called a "causal linkage."[55]

By its terms the causal linkage test is very flexible since the standard of "substantial increase in risk" is subject to varying interpretations. In cases involving the sale of defective products in flagrant disregard of the public safety, the test probably should be altered to whether *the defect or the manufacturer's misconduct* substantially increased the risk of the type of injury suffered by the plaintiff. When the causal linkage issue is close, and the manufacturer's behavior in marketing the defective product flagrantly improper, it is submitted that the determination of "substantial increase in risk" should be made against the manufacturer. This is appropriate because the normal balance of fairness between the plaintiff, normally carrying the burden of proof on causation, and the defendant, usually innocent or at worst inadvertent, is altered when the defendant has deliberately or recklessly exposed the plaintiff to a substantial risk of harm.

So, to change the facts of the previous hypothetical somewhat, assume that the plaintiff's decedent is found dead behind the wheel of his automobile that crashed into a tree. Suppose further that the evidence on the cause of the accident supports inferences of approx-

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[54]*See, e.g.*, Haft v. Lone Palm Hotel, 91 Cal. Rptr. 745, 478 P.2d 465 (1970); Reynolds v. Texas & Pac. Ry., 37 La. Ann. 694 (1885). *See generally* 2 HARPER & JAMES, *supra* note 33, § 28.7, at 1548.

[55]*See* Haft v. Lone Palm Hotel, 91 Cal. Rptr. 745, 755, 478 P.2d 465, 475 (1970); Calabresi, *supra* note 51, at 71-72. "In sum, the concept of causal linkage between acts and activities and injuries is no more than an expression of empirically based belief that the act or activity in question will, if repeated in the future, increase the likelihood that the injury under consideration will also occur." *Id.* at 72.

imately equal plausibility that the decedent either fell asleep at the wheel or was awake but unable to avert the accident because of defective brakes. If the manufacturer had failed to test the brakes adequately, and this failure is shown to have been reckless, in flagrant disregard of the risk to the public, the plaintiff can fairly be permitted to prevail on the causation issue. This should be true even though from the traditional perspective he is unable to meet his burden of proof (by a preponderance of the evidence) on this point. There are two reasons for this conclusion: (1) the manufacturer's misconduct substantially increased the risk of the type of accident that killed the decedent, and (2) the decedent was subjected to this risk only because of the manufacturer's grossly irresponsible behavior. This result effectively shifts the burden of proof on causation to the highly blameworthy manufacturer, an approach that has been used in certain other tort contexts where the usual burden of proof rules operate as harsh and insuperable obstacles to recovery and where they fairly may be altered in the plaintiff's favor.[56]

Thus, questions of causal linkage, rather than directly concerning metaphysical cause and effect, primarily involve questions of fairness to the parties concerning the *degree of proof* required to establish metaphysical causation. "The tendency to temper rules to fit moral conduct . . . in the field of certainty of proof" has been recognized on the damages side of tort law for some time.[57] Courts also have tended to administer the rules of causation "in such a manner as to be most severe upon the intentional wrongdoer and more severe upon the reckless wrongdoer than upon the negligent wrongdoer."[58] Thus, the manufacturer's blameworthiness may properly bear on the resolution of the cause in fact issue in certain products liability cases.

Drayton v. Jiffee Chemical Corp.,[59] while not expressly addressing the relation of blameworthiness to factual causation, is illustrative of how it may operate. The infant plaintiff sued the manufacturer of a drain cleaner called "liquid-plumr" for severe

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[56]*See, e.g.*, Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (burden of proof on identity of manufacturer of destroyed blasting cap that injured plaintiff shifted to multiple defendant manufacturers); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (burden of proof on identity of person responsible for plaintiff's traumatic injury while anesthetized for surgery shifted to multiple medical defendants); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (burden of proof on identity of hunter whose shot injured plaintiff shifted to defendants who simultaneously shot in plaintiff's direction).

[57]*See* Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 592 (1933).

[58]*Id.* at 588 (footnote omitted).

[59]395 F. Supp. 1081 (N.D. Ohio 1975).

burns suffered when a bottle of drain cleaner tipped over and doused her with the contents. The bottle was discarded after the accident,[60] and the manufacturer argued that its product had been mistaken for a competitor's drain cleaner called "Mister Plumber" which it claimed was more likely to have been the product that caused the plaintiff's injuries. Thus, the cause in fact question concerned the identity of the product.[61] Apart from the landlady's testimony that she had purchased a bottle of "liquid-plumr" more than a year before the accident, and the recollection of the plaintiff's parents, it appeared far more likely that the injury-producing product had indeed been "Mister Plumber" rather than the defendant's "liquid-plumr." Indeed, the father testified that after pouring some of the drain cleaner into the sink he covered it with a towel, just before the accident, and that he "dabbed" rather than "flushed" or "flooded" the child's face thereafter, actions much more consistent with the instructions on the competitor's label than on the defendant's.[62] Moreover, the extreme causticity of the product may have been more consistent with the chemical composition of the competitor's product.[63] Despite this strong objective evidence of product misidentity, the court nevertheless accepted the weaker testimonial identity evidence of the landlady and parents.[64]

The cause in fact issue was central in *Drayton;* either "liquid-plumr" had been the cause of the injuries, or it had not. Circumstantial evidence of causation or identity was all that was available, and the question could clearly be decided either way. It may be that what tipped the scales in the plaintiff's favor on this issue was evidence that the "defendant's conduct in designing and marketing liquid-plumr was . . . perhaps even reckless . . . ."[65] Although the blameworthiness issue was not fully developed in the reported opinion, this case illustrates the type of close cause in fact situation in which a manufacturer's culpability may influence the causation issue.

Another common cause in fact problem in products liability cases concerns the question of whether the plaintiff *relied* on the defendant's allegedly inadequate warnings or misleading

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[60]*Id.* at 1086.

[61]See note 56 *supra* noting examples of tort cases in other contexts where the plaintiff was relieved of his normal obligation to establish the identity of the defendant.

[62]395 F. Supp. at 1086-87. Nor had the father had any prior experience with other drain cleaners. *Id.* at 1087.

[63]*Id.* at 1087.

[64]*Id. See also* Drayton v. Jiffee Chemical Corp., 413 F. Supp. 834, 835-36 (N.D. Ohio 1976).

[65]395 F. Supp. at 1097.

statements.[66] If the plaintiff cannot demonstrate that the manufacturer's misrepresentation caused him to alter his conduct in a manner leading to his injury, or if he cannot establish that he would have read and acted upon an adequate warning so as to avert injury, then the plaintiff would not appear to be able to connect his injury to a breach of duty by the manufacturer. Such a failure to prevail on the cause in fact issue would seem to be fatal to the plaintiff's case.

But the plaintiff's failure personally to see or otherwise learn of the inadequate warning or misrepresentation should not necessarily be fatal to his case.[67] If he can establish that someone else's actions were affected by the inadequate or false information in a manner leading to the plaintiff's injury, he has established a causal connection.[68] For example, a doctor's reliance on drug literature may be imputed to his patient who is injured by the drug.[69]

Attributing reliance in this manner from a third person to the plaintiff should be liberally allowed in cases of flagrant marketing misbehavior by manufacturers. Thus, in the MER/29 situation discussed above,[70] the FDA's reliance on the company's manipulated animal test results should have inured to the benefit of every consumer injured by the defective drug since the FDA was acting on behalf of all consumers and since the company's misrepresentations made to that agency substantially increased the risk that the drug would be approved and that users would develop cataracts. Strangely, in *Roginsky v. Richardson-Merrell, Inc.*, Judge Friendly did not agree: "If we were forced to decide, we would say that a plaintiff does not make out a case of fraud simply by showing that if the facts had been fully stated, the FDA might not have released the drug."[71] If in fact the probability that the FDA would release the drug without further testing was increased in any material degree

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[66]*See generally* Phillips, *Product Misrepresentation and the Doctrine of Causation*, 2 HOFSTRA L. REV. 561 (1974).

[67]Some courts appropriately allow a presumption that the plaintiff would have read and heeded an adequate warning. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1281-82 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 358 N.E.2d 974 (Ind. 1976). *Cf.* Hamilton v. Hardy, 549 P.2d 1099, 1109 (Colo. Ct. App. 1976).

[68]*See* RESTATEMENT (SECOND) OF TORTS § 402B, Comment j (1965). *See generally* 2 HARPER & JAMES, *supra* note 33, § 28.7, at 1548.

[69]*See, e.g.*, Wechsler v. Hoffman-La Roche, Inc., 198 Misc. 540, 99 N.Y.S.2d 588 (Sup. Ct. 1950); Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 702, 60 Cal. Rptr. 398, 411 (1967). *Cf.* Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 1079, 91 Cal. Rptr. 319, 330 (1970).

[70]See text accompanying notes 20-21 *supra*.

[71]378 F.2d 832, 837 (2d Cir. 1967) (footnote omitted).

on account of the fraud,[72] then Judge Friendly's conclusion was quite clearly too restrictive. Even had Richardson-Merrell not been highly blameworthy, the plaintiff's causal link nonetheless would have been clearly established; the company's flagrant misbehavior should have eliminated any lingering doubts on this issue.

Since the Food and Drug Administration acts on behalf of the public, its reliance, like a doctor's, is plainly imputable to injured members of the public. But a nonrelying plaintiff may be able to establish a causal link, albeit a weaker one, even in cases where the third parties who did rely on the inadequate or false information were *not* acting on his behalf. For example, suppose a manufacturer markets a product with fraudulent claims of its safety or with grossly inadequate warnings in view of a known and serious hidden danger. Even if the injured plaintiff never learns of the fraudulent claims nor reads the label or product literature containing the warning, someone else may and thereby causally link the misconduct or the defect to the plaintiff's injury. One may assume that manufacturers culpably market products in this manner in order to improve the marketability of the product at a particular price.[73] If consumers were to know of the actual danger hidden in the product and wrongfully concealed from them by the manufacturer, many might be unwilling to purchase it at the same price or even at all.[74] Economic constraints might well then force the manufacturer either to cure the defect or, if that were not possible, perhaps to take it off the market altogether. In this way, a manufacturer's communication of false or inadequate information to consumers *in general* can be seen to increase the risk of harm to *all* consumers of the product, including those who individually neither knew of the misrepresentation nor read the inadequate warning. Even these consumers then, can establish a causal link between the manufacturer's informational malfeasance and injuries generated by the danger that was intentionally or recklessly concealed. The reliance of some, it might be said, fairly may be imputed to all.[75]

Since this type of causal link argument regarding safety information failures is concededly somewhat novel, some courts may reject it in cases of innocent or merely inadvertent conduct. Yet when the manufacturer deceitfully or recklessly misleads the public concern-

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[72]This appears to have been the case. *See* Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 696, 60 Cal. Rptr. 398, 405 (1967).

[73]*See* Owen, *Punitive Damages*, *supra* note 9, at 1294-95.

[74]*See* Larsen v. General Motors Corp., 391 F.2d 495, 505-06 (8th Cir. 1968); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 87 (4th Cir. 1962) ("had the warning been in a form calculated . . . to convey a conception of the true nature of the danger, this mother . . . might not have purchased the product at all").

[75]*See* Owen, *Punitive Damages*, *supra* note 9, at 1348-49 n.443.

ing the safety of a product, the imputation of reliance from consumers generally to those injured by the concealed danger appears eminently sound in both logic and justice. This should be equally true whether the misconduct involved supplying false assurances of product safety or failing to supply adequate warnings of danger. Thus, the cause in fact issue may appropriately be affected by the aggravated blameworthiness of the manufacturer in some types of products liability cases.

B. Proximate Cause

Proximate causation usually involves questions quite different from factual causation, although the two sometimes overlap. The establishment of some type of cause in fact linkage is in most cases an analytical prerequisite to an intelligent consideration of the proximate or legal cause issue.[76] Thus, the proximate cause issue generally assumes that the plaintiff's injury was in fact caused by the defendant's conduct or product defect, and involves the further question of whether the defendant for some other reason of policy or fairness should nonetheless be shielded from responsibility for the harm.[77] Perhaps the most unifying rationale for the variety of applications of the proximate cause doctrine is to avoid imposing on the defendant a crushing liability totally out of proportion to his degree of fault.[78] And so the rules of proximate cause are at least partially "geared to fault and will reflect the policy of making the extent of liability reflect the degree of fault or the factors which made conduct blameworthy."[79]

This aspect of the proximate cause rules in accident law has long been recognized[80] and was given explicit recognition in section 501(2) of the *Restatement (Second) of Torts:*

> The fact that the actor's misconduct is in reckless disregard of another's safety rather than merely negligent is a matter to be taken into account in determining whether a jury may reasonably find that the actor's conduct bears a sufficient

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[76]*See generally* W. PROSSER, *supra* note 52, § 42, at 249-50; Calabresi, *supra* note 51, at 72.

[77]Noting that "[p]roximate cause cannot be reduced to absolute rules," Prosser quotes 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906) as an accurate summary of the role of proximate cause: "It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." *See* W. PROSSER, *supra* note 52, § 42, at 249.

[78]*See, e.g.*, 2 HARPER & JAMES, *supra* note 33, § 20.4, at 1132.

[79]*Id.* at 1133.

[80]*See, e.g.*, Bauer, *supra* note 57, at 589.

> causal relation to another's harm to make the actor liable therefor.[81]

Rules of proximate cause, then, are to be "stretched" in cases of reckless misconduct. The rationale is clear: the application of rules designed to prevent liability from becoming unfairly disproportionate to the defendant's fault should adjust to situations in which the defendant is in fact seriously at fault.

There is no good reason why this principle relaxing the normal proximate cause rules should not apply to cases of flagrant misbehavior of manufacturers marketing defective products. In fact, there are at least two reasons why the principle is even better suited to the products liability context than to other accident situations. First, although one reason sometimes given for the principle is to deter similar misbehavior in the future,[82] liability insurance often frustrates this objective.[83] Yet, while liability for many kinds of accidents is generally insured, manufacturers often self-insure against products liability losses. Moreover, insurance premiums for most insured manufacturers are "loss-rated" so that the price is calculated primarily on the manufacturer's past products liability loss experience.[84] Second, a general criticism of the principle's deterrence rationale, that "most torts are unintentional or are committed in disregard or ignorance of legal consequences,"[85] is less applicable to the present context than to the typical accident situation. While a manufacturer's decision to market a product in flagrant disregard of a danger to consumers is certainly not an intentional tort in the same way as a punch in the nose, it is nevertheless deliberate and planned. Accordingly, manufacturers at least have an opportunity to consider the potential legal consequences flowing from their conduct. Indeed, while individual tortfeasors may not usually contemplate the legal consequences of their actions in most tort contexts, manufacturers often do receive legal counsel prior to acting. Thus, rules of proximate cause may fairly be stretched in cases of flagrant marketing misconduct by manufacturers.

Most courts for example have held that the normal proximate cause rules limiting liability to the foreseeable consequences of an action operate in the products liability area as in tort law generally.[86] Liability should probably be barred, therefore, if the

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[81] RESTATEMENT (SECOND) OF TORTS § 501(2) (1965).

[82] *See* 2 HARPER & JAMES, *supra* note 33, § 20.6, at 1152-53.

[83] *See id.* at 1133.

[84] *See* Owen, *Punitive Damages*, *supra* note 9, at 1309 n.252 and accompanying text.

[85] 2 HARPER & JAMES, *supra* note 33, § 20.6, at 1152 (footnote omitted).

[86] *See generally* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 11.02 (1976). However, liability in strict tort under the cost-benefit theory may arise without regard

plaintiff is injured by slipping on the vomit of a person who has suffered an allergic reaction to the defendant's drug which carried inadequate warnings of such reactions.[87] However, if the drug manufacturer knew of frequent cases of similar allergic reactions but failed to warn about them to avoid losing sales, the scope of liability flowing from such reactions could appropriately be broadened to include the plaintiff's injuries in the case hypothesized.

The relaxation of the normal proximate cause rules in cases of reckless misconduct applies equally well in intervening cause cases. Suppose the plaintiff is injured by the explosion of a cylinder overpressurized by his employer with compressed air. Suppose further that, although the cylinder had contained a gas refrigerant when purchased by the employer from defendant, and bore a label indicating that refilling the cylinder was not only dangerous but contrary to law, the employer had nevertheless recharged it with pressurized air.[88] If the seller of gas refrigerant had no reason to know that its warning was being ignored and that cylinders were being refilled in a dangerous manner, it should not be liable for failing to add a safety release valve to prevent overpressurization by third parties acting contrary to law and to the warnings on the cylinder. In this situation, the intervening action of the employer should probably break the causal chain of events. But suppose the seller knew that persons frequently were being injured severely by explosions caused by such rechargings despite the warnings, and that installation of a simple and inexpensive safety device on the cylinders would eliminate the danger. Under these circumstances, the failure to add such a device might well be sufficiently blameworthy to expand the scope of liability to include resulting injuries regardless of the culpability of the employer's intervening conduct.[89] The rules of proximate cause thus may properly be stretched, and

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to the foreseeability of the injuries, *see* text accompanying note 41, and a few courts have so intimated. *Cf.* Phillips v. Kimwood Mach. Co., 269 Or. 485, 491-94, 525 P.2d 1033, 1037-39 (1974); Berkebile v. Brantly Helicopter Corp., 219 Pa. 479, 485, 337 A.2d 893, 900 (1975); Helicoid Gage Div. of Amer. Chain & Cable Co. v. Howell, 511 S.W.2d 573, 575 (Tex. Ct. Civ. App. 1974).

[87] *Cf.* Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 156 S.E.2d 208 (1967) (unwholesome food).

[88] *Cf.* Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

[89] It should be noted in this situation, as in many others raising the issue of proximate causation, that the normal rules of proximate cause may be sufficiently flexible to expand the scope of liability to include injuries attributable to negligent or reckless misconduct even without a special rule so providing. The flagrancy of a defendant's misconduct often reflects, among other factors, his *awareness* of a particular danger. *See* Owen, *Punitive Damages*, *supra* note 9, at 1361-71. And dangers known are obviously "foreseeable" which is of course how the scope of responsibility is defined in many proximate cause contexts.

the scope of a manufacturer's duty accordingly increased, in products liability cases of reckless manufacturer misconduct.

V. DEFENSES BASED ON PLAINTIFF'S CONDUCT

Four different defense doctrines based on the plaintiff's conduct—contributory negligence, comparative negligence, assumption of risk, and product misuse—may be available in a products liability case, depending upon the jurisdiction and the plaintiff's theory of liability. The aggravated blameworthiness of the manufacturer in marketing a defective product may play a significant role with respect to each of these defenses.

A. Contributory Negligence

Of all the rules of liability and defense, the contributory negligence defense is most clearly affected by the reckless nature of a defendant's conduct: "A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety."[90] The rule logically applies to products liability cases.[91] So, if a plaintiff is injured in a crash caused by the blowout of a tire having an obvious defect that he carelessly failed to discover, his negligent failure to inspect the tire will not bar a negligence or warranty[92] action if the manufacturer is shown to have marketed the tire in reckless disregard of consumer safety. Moreover, even the plaintiff's negligent decision to drive on the tire after discovering the defect and realizing the danger will not bar his recovery on contributory negligence grounds.[93] It is difficult to argue against this rule since the responsibility for an injury caused by a highly blameworthy defendant can much more fairly be

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[90]RESTATEMENT (SECOND) OF TORTS § 503(1) (1965). A duplication of the rule is found in section 482(1) of the *Restatement*. *See generally* W. PROSSER, *supra* note 52, § 65, at 426; 2 HARPER & JAMES, *supra* note 33, § 22.6, at 1213.

[91]*See* Ussery v. Federal Laboratories, Inc., [1973-75 Transfer Binder] PROD. LIAB. REP. (CCH) ¶ 7084, at 12,470, 12,479 n.4 (4th Cir. 1973) (Winter, C.J., dissenting) (opinion withdrawn by order filed March 31, 1975).

[92]In a minority of states, contributory negligence will defeat a warranty claim. *E.g.*, Coleman v. American Universal of Florida, Inc., 264 So. 2d 451 (Fla. App. 1972); Devaney v. Sarno, 122 N.J. Super. 99, 299 A.2d 95, *rev'd on other grounds*, 125 N.J. Super. 414, 311 A.2d 208 (1973) (failure to wear seatbelt). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.01[3] (1976). Of course "simple" contributory negligence is held not to be a defense to strict liability in tort in most states. *See, e.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

[93]*See* RESTATEMENT (SECOND) OF TORTS § 503, Comment b (1965): "[H]e is not barred from recovery merely by a failure to exercise reasonable care . . . after he knows of the defendant's reckless misconduct and realizes the danger."

placed on him, the principal causative agent, than on the injured plaintiff who was at worst somewhat careless concerning his own safety. However, if the injured plaintiff was reckless with regard to his own safety, as by driving at high speeds on a tire discovered to be seriously defective, he will be barred from recovery against even a reckless manufacturer whether the action is brought in negligence,[94] warranty,[95] or perhaps even strict liability in tort.[96]

B. Comparative Negligence

While the application of the comparative negligence doctrine to products liability litigation involves too many complex and unresolved problems to examine fully here,[97] a few observations may be made on the effect a manufacturer's aggravated blameworthiness should have on the doctrine in general. Abandoning the "all-or-nothing" approach of the contributory negligence defense, comparative negligence instead apportions damages between the parties on the basis of their respective fault.[98] Consequently, if a manufacturer is shown to have been flagrantly at fault, it initially would appear appropriate simply to balance this off against the plaintiff's contributory fault in apportioning damages.

Yet this conclusion conflicts with the traditional contributory negligence rule discussed above that allows a negligent plaintiff *full* recovery for injuries caused by a *reckless* defendant. How is this impasse to be resolved? One solution would be to attempt to advance the punitive, deterrent, and compensatory purposes underlying the full recovery rule to the utmost by requiring the reckless defendant to pay for all the plaintiff's damages. But this full recovery approach

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[94]*See, e.g.*, 2 HARPER & JAMES, *supra* note 33, § 22.6, at 1214; W. PROSSER, *supra* note 52, at 426; RESTATEMENT (SECOND) OF TORTS §§ 482(2), 503(3) (1965).

[95]Even in those states that do not recognize the contributory negligence defense in warranty cases, see note 92 *supra*, a court might bar recovery on the basis of the plaintiff's reckless disregard for his own safety. In a case involving this type of aggravated consumer misconduct, the court might find that the defect was not a proximate cause of the injury. *See* U.C.C. §§ 2-314, Comment 13, 2-316(3)(b) & Comment 8, 2-715(2)(b) & Comment 5.

[96]The conduct may amount to an unreasonable or reckless assumption of the risk and an action may be barred on that account. *See* text accompanying notes 104-16 *infra*. Even in such a situation, however, a rule of comparative misconduct would probably best accommodate the interests of the parties in most cases. *See* text accompanying note 116 *infra*.

[97]On the role of comparative negligence in strict tort cases, *see* Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 299, 319-335 (1977).

[98]*See generally* V. SCHWARTZ, COMPARATIVE NEGLIGENCE (1974).

looks almost exclusively to the interests of the plaintiff,[99] whereas the comparative negligence doctrine generally has been adopted to reach a fair accommodation of interests between plaintiffs and defendants. Since contributorily negligent plaintiffs are to some extent both causally and morally responsible for their injuries, it would appear fair to require them to absorb the relatively small proportion of their damages logically attributable more to their own negligent misbehavior than to the defendant's reckless misconduct.[100]

It may be that special considerations in some products liability situations will dictate the reconsideration of the damages apportionment principle as Professor Twerski has suggested.[101] Perhaps, indeed, the reckless manufacturer should be punished by being required to pay for the damages otherwise more appropriately allocated to the injured plaintiff. Yet punishment is probably more satisfactorily administered through assessments of punitive damages[102] than by relieving the injured party of his fair share of the burden of the actual damages.[103] Thus, in the application of the comparative negligence rules, the recklessness of a manufacturer's misconduct ordinarily should affect only the apportionment of damages.

C. *Assumption of Risk*

While it has been subjected to less abuse than has the contributory negligence defense, assumption of risk has been battered around quite a bit by courts[104] and commentators,[105] in tort law

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[99]*See id.* at 108.

[100]Moreover, the application of a rule of comparative fault would obviate, at least for this purpose, the need to determine whether the defendant's conduct was "flagrant" or "reckless."

[101]*Cf.* Twerski, *The Use and Abuse*, *supra* note 97; Twerski, *From Defect to Cause*, *supra* note 97.

[102]*See generally* Owen, *Punitive Damages*, *supra* note 9.

[103]Theoretically an award of punitive damages to the plaintiff could result in a "wash" with the compensatory damages allocated against him for his proportionate fault. The two amounts, however, would properly be identical only on rare occasions. Nevertheless, in cases of marginally reckless misconduct by the defendant, this type of wash approach—one that would fully compensate the plaintiff without substantially punishing the defendant—might often appeal to the jury.

[104]*E.g.*, Hale v. O'Neill, 492 P.2d 101 (Alaska 1971); Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977); Roseman v. City of Estherville, 199 N.W.2d 125 (Iowa 1972); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971); Farley v. MM Cattle Co., 529 S.W.2d 751 (Tex. 1975); Rosas v. Buddies Food Stores, 518 S.W.2d 534 (Tex. 1975).

[105]*See, e.g.*, 2 HARPER & JAMES, *supra* note 33, § 21.8; James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); James, *Assumption of Risk*, 61 YALE L.J. 141 (1952). *See generally* RESTATEMENT (SECOND) OF TORTS § 893, at 70-87 (Tent. Draft No. 9, 1963).

generally and products liability law in particular.[106] Traditionally, however, and still in the vast majority of states in most situations, a plaintiff's knowing and voluntary assumption of the risk is a complete bar to his recovery, even when the defendant has acted recklessly: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[107] In some situations more than others, it is particularly harsh to bar a plaintiff from all recovery because of his reasonable decision to encounter a risk created by the defendant's misconduct. As a result, some courts and legislatures have abolished the rule either altogether[108] or in situations in which one party occupies a powerful position of control over the welfare of the plaintiff.[109]

Manufacturers, with near-monopolistic control over vital information concerning product hazards and danger control, have such a grip on the welfare of consumers.[110] Partly as a response to this phenomenon, most courts have narrowed the availability of the assumption of risk defense in strict tort products liability actions by limiting the defense to cases of *negligent* assumptions of risk: "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds *unreasonably* to make use of the product and is injured by it, he is barred from recovery."[111]

This limitation on the assumption of risk defense may or may not adequately accommodate the interests of producers and consumers in a typical products liability case[112] involving innocent or perhaps even negligent misconduct by the manufacturer. But the

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[106]Two excellent articles on the topic are Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974).

[107]RESTATEMENT (SECOND) OF TORTS § 496A (1965). Section 503(4) mirrors the rule except that it is limited to the defendant's reckless misconduct.

[108]*See, e.g.*, cases cited in note 104 *supra*.

[109]As, for example, employers and landlords. *See* RESTATEMENT (SECOND) OF TORTS § 496A, Comment e (1965).

[110]*See* Owen, *Punitive Damages*, *supra* note 9, at 1258, 1272 n.69, 1365 n.507. *Cf.* Raymond v. Eli Lilly & Co., 371 A.2d 170 (N.H. 1977) (Kenison, C.J.).

[111]RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965) (emphasis added). *See, e.g.*, Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972) (making an *Erie* guess on Texas law); Devaney v. Sarno, 125 N.J. Super. 414, 311 A.2d 208 (App. Div. 1973), *aff'd* 65 N.J. 235, 323 A.2d 449 (1974); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976). *But see* Henderson v. Ford Motor Co., 519 S.W.2d 87, 91 (Tex. 1974) (repudiating Fifth Circuit's *Erie* guess, holding that the plaintiff's unreasonableness in encountering the risk is not always an element of the assumption of risk defense in strict tort).

[112]The appropriateness of the rule will of course vary depending on the particular situation. *See generally* Twerski, *supra* note 106.

rule is quite clearly ill-suited to cases in which the risk assumed by the plaintiff was created by the manufacturer in flagrant disregard of the danger to consumers. Even in the general tort situation, it has been seen that conduct strikingly similar to negligent assumption of risk will not bar a plaintiff's recovery against a reckless defendant. As discussed above, the plaintiff who is injured when he unreasonably continues to drive on a tire discovered to be defective may not, on contributory negligence grounds, be barred from recovery against the manufacturer who marketed the product in reckless disregard of the risk to consumers.[113] Because of the manufacturer's powerful position of control over product safety, this is surely the proper result, whatever may be the plaintiff's theory of recovery and whatever the name of the asserted defense.

Is the answer then to abolish *all* forms of assumption of risk in products liability cases in which the plaintiff's injury is attributable to some reckless misconduct by the manufacturer? While such a solution does have some merit, it also has some drawbacks. Punishment and deterrence, as has been discussed,[114] are probably better accomplished in other ways, and even the reckless manufacturer has a legitimate interest in avoiding liability for at least some injuries attributable to the knowing misuse of its products. If an all-or-nothing assumption of risk rule of some sort is to be retained in these cases, it should probably be limited to cases in which the consumer *recklessly* assumes the risk of injury.[115] In the defective tire hypothetical, for example, perhaps the plaintiff should be barred from recovery if he drove *at high speeds* on the tire he knew to be seriously defective.

Cases such as this have a strong flavor of superseding causation, and it may be appropriate in some such instances to shield even the reckless manufacturer from liability altogether. Yet clearly the more palatable approach would be to apportion the damages in such cases according to the respective fault of the two reckless parties according to the rules of comparative negligence.[116] Assumption of risk could thereby be abolished as a complete defense at least to flagrantly blameworthy misconduct by manufacturers. At a minimum, however, a court in such cases would do well to limit the defense to instances of reckless assumption of risk, as discussed above.

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[113] *See* note 93 *supra* and accompanying text.

[114] *See* text accompanying notes 102-03 *supra*.

[115] *Cf.* Worth v. Dunn, 98 Conn. 51, 61, 118 A. 467, 471 (1922) ("reckless and unnecessary exposure to risk of injury").

[116] *See generally* Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977) (merging assumption of risk into comparative fault); V. SCHWARTZ, COMPARATIVE NEGLIGENCE 111, 165-75 (1964).

D. *Product Misuse*

The "misuse" or abnormal use of a product will serve under some circumstances to defeat an action by a person injured by a product claimed to have been defective. While some courts treat abnormal use as an affirmative defense,[117] and other courts consider normal use as part of the plaintiff's prima facie case,[118] most courts agree that product misuse will bar recovery in some situations.[119] So, a person injured in an automobile crash caused by tire failure may be barred from recovery if the failure is partially attributable to substantial overinflation of the tire contrary to the manufacturer's instructions.[120] Misuse is a bar to recovery in cases like this because "the result is not within the risk, or, as many courts state the matter, the result is not proximately caused by the defendant's conduct."[121] Since the rationale for this "defense" is thus usually based upon proximate causation, the predominant "test" or definition of the rule that has evolved is one of foreseeability: "[T]he manufacturer is not liable for injuries resulting from abnormal or unintended use of his product, *if* such use was not reasonably foreseeable."[122]

Earlier it was determined that the normal rules of proximate cause should be "stretched" in cases of flagrant marketing misbehavior.[123] Since the misuse "defense" is generally only a special application of the proximate cause doctrine, it seems clear that it should be affected in a similar manner by similar manufacturer misbehavior. Thus, in the overinflated tire case, suppose the manufacturer knew that overinflation would weaken its tires, that consumers were frequently overinflating them in an effort to prolong the life of the tread, and that tire failures causing serious injuries often occurred as a result. The failure to take effective steps to warn of the danger of overinflation under these circumstances might reasonably be considered reckless misconduct,[124] and the scope of responsibility could then appropriately be expanded to include

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[117]*E.g.*, McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[118]*E.g.*, Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A, Comments g, h (1965).

[119]*See generally* 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 15 (1976); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 95-105 (1972).

[120]*Cf.* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 288-89 (5th Cir. 1975); McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

[121]Noel, *supra* note 119, at 95.

[122]1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 15, at 404 (1976) (emphasis in original).

[123]See text accompanying notes 76-89 *supra*.

[124]*See generally* Owen, *Punitive Damages*, *supra* note 9, at 1345-52.

many injuries resulting from this type of misuse. Normally a tire manufacturer might "reasonably" foresee overinflation of a limited amount, perhaps up to six or eight pounds or so. It would appear both fair and logical to expand the "reasonable foreseeability" of a highly blameworthy tire manufacturer to include instances of much greater overinflation, such as ten or twelve pounds over the recommended pressure, or perhaps even more.[125]

The rationale, of course, for "stretching" the reasonable foreseeability test of the product misuse defense in cases of reckless manufacturer misconduct is naturally similar to the justification for expanding the rules of proximate cause in similar circumstances. In both instances the rules at least in part seek to protect defendants from liability burdens greatly disproportionate to their actual fault. Thus, if a manufacturer is shown to have actually been at fault, and *flagrantly* so, the misuse defense should be adapted to reflect this fact. Perhaps the use of a comparative fault or causation rule might be the fairest and least confusing way to accomplish this result in some misuse cases.[126] Apart from this approach, however, the "reasonably foreseeable" test of the misuse defense should generally be "stretched" in products liability cases involving flagrant manufacturer misbehavior.

VI. CONCLUSION

Manufacturers who market defective products that injure consumers are required under strict products liability principles to pay for the resulting injuries without regard to their blame in marketing such products. Occasionally a manufacturer's conduct in placing or leaving a product on the market in a particular condition is for one reason or another highly blameworthy. In cases of this type, the traditional structure of the normal accident rules of liability and defense is thrown off balance. Much, perhaps most, products liability doctrine developed under the law of negligence, where the manufacturer's carelessness—often merely inadvertent—was a focal point

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[125]Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962), a negligence action for the death of an infant who ingested the defendant's furniture polish that bore inadequate warnings, was one of the first cases to replace the "intended use" defense with a test of reasonable foreseeability. " 'Intended use' is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability . . . ." *Id.* at 83. It is noteworthy that the manufacturer in this case had failed to warn adequately of the toxic nature of the polish despite its knowledge of thirty-two cases of human ingestion resulting in ten deaths. *Id.* at 88.

[126]*See* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *Cf.* text accompanying note 116 and note 96 *supra*.

from which the rules of duty, causation, and defense were generated. With the advent of strict liability in tort, readjustments have been made in some of the products liability rules, particularly in connection with the traditional defenses of contributory negligence and assumption of risk. But something was apparently lost sight of in the dust of the stampede first to demolish the bastion of privity and then to erect a new bastion for strict liability in tort. So much attention was devoted to the questions of whether and how *innocent* manufacturers should be liable for defects in their products, surely the more usual situation, that the questions of whether and how the rules should apply to *highly blameworthy* manufacturers were simply forgotten.

The purpose of this article has been to propose some readjustments that should help to restore a fair balance in the rules of liability and defense in cases of flagrant marketing misbehavior. Since the courts so far have failed to address the problem, the analysis has necessarily proceeded largely in the dark. Surely judicial experience in applying the proposed changes in the rules will be necessary to determine their usefulness in resolving products liability cases. Some of the adjustments I have advanced merely involve the application of established rules of tort law to the products liability context; others tread on less traditional ground. But each of the changes proposed is designed to strike a fair accommodation between the interests of manuacturers and those of consumers.

The scope of this article has been limited to the central issues in products liability litigation—defectiveness, causation, and the defenses based on the plaintiff's conduct. Several of the more peripheral issues, however, are ripe for exploration. The rule obtaining in many states, for example, prohibiting recoveries for wrongful death in warranty actions will probably not survive a reasoned scrutiny in the context of a highly blameworthy manufacturer.[127] It may also be that a *products liability* suit should lie against an employer, despite the normal bar to such suits in the workmen's

[127]Recovery under the wrongful death acts, patterned after Lord Campbell's Act, usually is limited to deaths caused by "a wrongful act, neglect or default," or similar language. *See, e.g.*, D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 553 n.13 (1973). Some courts prohibit recovery for wrongful death in warranty actions on the theory that warranty liability is contractual and "strict" rather than the tortious type of wrongful behavior contemplated by the death acts. *See, e.g.*, Nectas v. General Motors Corp., 357 Mass. 546, 259 N.E.2d 234 (1970). *See generally* 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 42, at 651 (1976). However, proof that a defendant acted recklessly should logically permit recovery even under a narrow construction of such an act, for reckless conduct is surely classifiable as "wrongful" or "neglectful." Nor should the fact that the underlying theory of recovery requires less proof of blameworthiness affect this conclusion. *Cf.* Owen, *Punitive Damages*, *supra* note 9, at 1268-75.

compensation laws, for removing an appropriate manufacturer-installed guard on a piece of industrial machinery in order to increase production.[128] And many other products liability rules, involv-

[128]Such action by the employer is highly blameworthy when done to increase production if the guard is appropriate for the task to which the machine is put by the employer. If the employee in such a case were to sue the manufacturer for defective design, the manufacturer would prevail in many instances on grounds of the nondefectiveness of the machinery, or on principles of intervening causation. *See, e.g.*, Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971); Smith v. Hobart Mfg. Co., 302 F.2d 570 (3d Cir. 1962); Santiago v. Package Mach. Co., 123 Ill. App. 2d 305, 260 N.E.2d 89 (1970). *See generally* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident*, 14 DUQ. L. REV. 349, 369-73 (1976).

Because workmen's compensation benefits are normally provided by statute to be the employee's exclusive remedy for covered injuries against the employer, 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 65.00 (1976), an employee in such a case would be left with only his workmen's compensation benefits which are plainly inadequate and do not even purport to provide full reparation. *See* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 126 (1976); Mitchell, *supra*, at 354-56. There are two exceptions to the exclusive remedy doctrine that may logically combine, however, to permit an employee to maintain a *products liability* action against the employer whose removal of the manufacturer's guard caused the employee to be injured: (1) an exception based on the employer's intentional injury to his employee, and (2) an exception for cases in which the employer is acting in a "dual capacity."

Considered alone, the intentional injury exception has been construed narrowly to exclude an employer's removal of guards. *See* Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976); Santiago v. Brill Monfort Co., 11 App. Div. 2d 1041, 205 N.Y.S.2d 919, *aff'd*, 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1960). *See generally* 2A A. LARSON, *supra*, at § 68; Schmidt & German, *Employer Misconduct as Affecting the Exclusiveness of Workmen's Compensation*, 18 U. PITT. L. REV. 81 (1956). The employee's argument that the exclusive remedy provision of the statute should be interpreted to allow suits in this type of case is of course weakened if the statute provides for an increase in benefits for employer misconduct. *See* 2A A. LARSON, *supra*, at §§ 69.10-.20 (1975).

The second applicable exception to the exclusive remedy principle, the "dual-capacity" doctrine, allows the employer to be sued if the injury is traceable to an activity of the employer "that confers on him obligations independent of those imposed on him as employer." 2A A. LARSON, *supra*, at § 72.80, at 14-112 (1976). A recent case has rejected the argument that an employer removing a guard to increase production is thereby acting in a "second capacity" as a *manufacturer* of the machinery reconstructed to serve his needs. Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d at 792, 354 N.E.2d at 557. *See also* Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3600 (Mar. 8, 1977); Williams v. State Corp. Ins. Fund, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975); Needham v. Fred's Frozen Foods, Inc., 359 N.E.2d 544 (Ind. Ct. App. 1977); Neal v. Roura Iron Works, Inc., 66 Mich. App. 273, 238 N.W.2d 837 (1975); Panagos v. North Detroit Gen. Hosp., 35 Mich. App. 554, 192 N.W.2d 542 (1971). *See generally* Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818 (1974).

As argued cogently in the *Rosales* dissent, however, the two exceptions merge into a compelling argument for permitting suit against an employer who reconstructs his machinery by removing guards to increase production at the obvious expense of

ing problems of privity,[129] obvious, dangers, disclaimers of liability,[130] limitations on remedies, notice, statutes of limitations, contribution and indemnity and others, may also prove to require readjustment in cases of flagrant marketing misbehavior. The time is nigh for the courts to re-examine the normal rules of liability and defense in the context of the highly blameworthy manufacturer.

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employee safety. *See* 41 Ill. App. 3d at 796, 354 N.E.2d at 561 (Simon, J., dissenting). By so altering the machinery, in flagrant disregard of the danger to employees, the employer flouts and subverts the common-law and statutory rules of product safety. Apart from the fact that such behavior deserves to be punished and ought to be deterred, an employee injured thereby surely should be afforded full compensation against the responsible party. Allowing noninsurable damage suits against the employer appears to be an effective method of accomplishing these objectives without substantially impairing the general exclusive remedy principle of the workmen's compensation laws. Moreover, punitive damages assessments might even be in order in appropriate cases of this type.

[129]It should be noted that an early exception to the privity defense was made for cases involving the sale by the manufacturer of "an article which he knows to be imminently dangerous to life or limb of another without notice of its qualities." Huset v. J.I. Case Threshing Machine Co., 120 F. 865, 871 (8th Cir. 1903). *See* Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098 (1905) (fraudulent act); Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1837), *aff'd*, 4 M. & W. 337 (1838) (fraud).

There appears to be no particular reason why this privity exception should not be extended to other nonfraudulent cases of flagrant manufacturer misbehavior as well.

[130]*Compare* RESTATEMENT (SECOND) OF TORTS § 496B (1965) ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is contrary to public policy.") *with* RESTATEMENT (SECOND) OF CONTRACTS § 337(1) (Tent. Draft No. 12, 1977) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.")